**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TEXAS**
**SHERMAN DIVISION**

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| The State of Texas, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>Google LLC,<br><br>Defendants. | Case No. 4:20-cv-00957-SDJ<br><br>Hon. Sean D. Jordan<br><br>Special Master: David T. Moran |

**PLAINTIFF STATES' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE OPINIONS OF ITAMAR SIMONSON**

## INTRODUCTION

Google's Opposition mostly argues around the fatal deficiencies Plaintiffs identified in their Motion. First, Google ignores that its gerrymandering of the survey populations excluded the advertisers and ad agencies *most relevant* to this case. Second, Google defends its opt-out disclosure by criticizing Plaintiffs for not showing how the opt-out respondents would have answered—even though Google made it impossible to do so by failing to retain any opt-out data. Finally, Google frames Plaintiffs' critique of Dr. Simonson's use of vague language as an inconsequential "quibble with question phrasing," ignoring that the phrase is a term of art.

## ARGUMENT

### I. Dr. Simonson's Surveys Are Unreliable Because They Are Unrepresentative.

Google makes three arguments about why the surveys are reliable despite being unrepresentative. *First,* Google contends that Plaintiffs "provide no indication of what 'proportion of the target population [was] excluded.'" Opp. at 8 (alteration in original). But this is simply wrong. Plaintiffs identified that Dr. Simonson's Ad Agency Survey excluded the six largest global ad agencies, which collectively account for *nearly a third* of all ad spending. *See* Mot. at 11. Plaintiffs also noted the advertiser surveys excluded—among others—30% of the Fortune 500 and 50% of the Fortune 10. *Id.* Dr. Simonson intentionally excluded not just any advertisers and ad agencies, but those whose opinions are most relevant to the claims at issue in this case. A survey that excludes the *most relevant* market participants is not reliable. *See, e.g., Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 264 (5th Cir. 1980) ("The appropriate universe [for a survey] should include a fair sampling of those purchasers most likely to partake of the alleged infringer's goods or services.").

*Second*, Google claims that Plaintiffs "do not even provide a hypothesis—let alone any evidence—on the extent to which the excluded population . . . was likely to respond any differently than the included population." Opp. at 8. But Plaintiffs have explained why the excluded potential

respondents were distinct—they are the most sophisticated and significant ad tech consumers, accounting for an outsized proportion of ad tech transactions. *See* Mot. at 9-12. At any rate, the Court should reject Google's attempted burden-shifting. Google must show that Dr. Simonson's surveys were reliable, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590-91 (1993), and it cannot do so because Dr. Simonson did not even analyze the effect of excluding the most relevant market participants from his survey populations. *See* Mot. at 11-12.

*Third,* Google argues: "[t]his is not a case where we do not know how individuals on the No Contact List would have responded" because "[m]any . . . actually provided discovery in this case," citing deposition testimony from six companies. Opp. at 8-9. But that testimony discusses whether those companies would shift advertising spend from a *poorly performing* channel to a better performing one. It says nothing about the key inquiry of the surveys: substitution behavior in response to an *increase of cost* of one channel. And even if there *was* evidence about the companies' substitution behavior, the point is that *Dr. Simonson* did not take the "special precaution" of analyzing it to "reduce the likelihood of biased samples." Fed. Jud. Ctr., *Reference Manual on Scientific Evidence* ("*FJC Ref. Man*.") at 382-83.

Google argues that the cases cited in Plaintiffs' Motion are "inapposite" because the surveys in those cases "all omitted *entire categories* of potential respondents." Opp. at 9 (emphasis in original). Google misreads the cases. In *Scott Fetzer Co. v. House of Vacuums Inc*., 381 F.3d 477, 488 (5th Cir. 2004), the Fifth Circuit noted that the exclusion of a subset of purchasers of vacuum repairs rendered the population "suspiciously underinclusive." Those purchasers had nothing in common aside from purchasing their vacuum cleaners secondhand. It was that those purchasers constituted a substantial part of the population the survey purported to examine that rendered the sample so underinclusive as to be unreliable. *Id.* Even if the cases stood for the proposition that underinclusive surveys are unreliable only if they exclude "entire categories" of potential respondents, the surveys here are still unreliable. Google contends that "[t]he only

commonality among the excluded entities that Plaintiffs can point to is their size . . . ." Opp. at 10. But the issue is not the companies' size, it is their unique importance in the ad tech market. *See* Mot. at 3. Without assessing the opinions of advertisers and ad agencies that account for such an outsized proportion of the market, the surveys tell us nothing about relevant substitution behavior.

Finally, Google argues that Dr. Simonson took "special precautions" by: (1) conducting preliminary interviews; (2) ensuring large sample sizes, (3) corroborating the representativeness of the samples, and (4) verifying the surveys had a statistically significant number of large and small advertisers. Opp. at 11. But Dr. Simonson's "thorough vetting" of AdPros consisted of a mere fourteen preliminary interviews, all of which were biased by his disclosure of the surveys' sponsor and purpose at the outset. *See* Mot. at 6. And the second and fourth "special precautions" applied only to the advertiser (not ad agency) populations.

## II. The Opt-Out Disclosures Unblinded the Surveys and Rendered Them Unreliable.

Google first argues that assuming the reason respondents chose to opt out after learning Google sponsored the surveys for antitrust litigation purposes was because their responses were adverse to Google is an "unwarranted" "logical leap." Opp. at 11-12. But is it not a "logical leap" to assume the opt-out respondents made that decision; it is, in fact, the only logical conclusion. Dr. Simonson's unexplained and unjustified decision not to retain the opt-out respondents' data is the reason Plaintiffs (and Google) cannot *know* why they opted out.

Google defends its decision to force Dr. Simonson to allow respondents to opt out by noting that the *FJC Reference Manual* observes that "in some surveys (e.g., some government surveys), disclosure of the survey's sponsor to respondents (and thus to interviewers) *is required*." Opp. at 12 (emphasis added) (citing *FJC Ref. Man.* at 411). The FTC Opinion Google relies on was one such instance where "[t]he notification regarding the opt-out option and the purpose of the survey, [was] required by the Privacy Act, 5 U.S.C. § 552a(e)(3) . . . ." Comm'n Op. at 69, *In re Intuit,*

*Inc.*, FTC Docket No. 9408 (Jan. 22, 2024). Here, Dr. Simonson was not "required" to disclose the survey's sponsor and purpose. At any rate, the FJC Manual says that the disclosure of a survey's *sponsor* is sometimes unavoidable and so does not necessarily bias the results. But Dr. Simonson unnecessarily disclosed both the sponsor *and the purpose* of the surveys, thus inviting respondents to abandon their responses if they felt they would be adverse to Google's litigation posture. This is especially suspect because Google is a dominant player in the ad tech space. When courts find that an opt-out disclosure of a survey's sponsor did not bias the results, they often note that—unlike here—the opt-out did not disclose the purpose. See, e.g., *FTC v. Nudge, LLC*, No. 2:19-cv-867-DBB-DAO, 2022 WL 2132695, at *6 (D. Utah June 14, 2022) ("The statements disclosing the FTC as the surveys' sponsor were brief *and did not disclose the survey's purpose*." (emphasis added)). Google emphasizes that "Plaintiffs have provided no data or other evidence demonstrating potential bias" created by the opt-out disclosure as evidence that the surveys were not, in fact, biased. Opp. at 13. But Plaintiffs *could not* provide any such "data or other evidence" because Dr. Simonson did not collect or analyze any. Mot. at 13. Plaintiffs do not even know who the opt-out respondents are.

Google also argues that "whether the disclosure biased the results goes to the survey's weight rather than admissibility." Opp. at 13 (citing cases). But fundamental design decisions like unblinding a survey go to reliability, not weight. *See, e.g., Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1009 (N.D. Ill. 2010), *aff'd*, 412 F. App'x 304 (Fed. Cir. Mar. 11, 2011) ("Failure to conduct an appropriate double-blind study limits the reliability of the survey.").

## III. The Surveys' Vague and Ambiguous Language Renders Them Unreliable.

Google contends that Dr. Simonson's use of the vague and ambiguous term "small but significant" is a "quibble[] with question phrasing" that goes to weight, not admissibility. Opp. at 14. The cases Google cites do not support this proposition. In *Honestech, Inc. v. Sonic Solutions*, the court found the survey expert's failure "properly to account for the presence of two competing

products in the marketplace" in his questioning did not bias the results. 430 F. App'x 359, 362 (5th Cir. 2011). And in *Firebirds International, LLC v. Firebird Restaurant Group, LLC*, No. 3:17-CV-2719-B, 2019 WL 3957846, at *3 (N.D. Tex. Aug. 21, 2019), the court rejected defendants' argument that the survey expert should have asked about "whether [respondents] believed that Defendants' services belong to Plaintiff, instead of asking whether they believe that Plaintiff is part of FRG."[1] Here, the error is much more fundamental. Dr. Simonson's vague wording resulted in each respondent effectively answering a different question, based on their own unique interpretation of the term "small but significant."

Next, Google argues that the vague and ambiguous language does not render the survey unreliable because Dr. Simonson chose "qualitative words" because they are "familiar" and "plain language words." Opp. at 14 (citing Simonson Tr. 175:4-8; 249:2-252:21). But the phrase "small but significant" is not just a collection of "plain language words." It is a term of art with a particular (and crucial) meaning in the antitrust context.

Finally Google attempts to cite Prof. Mathiowetz's deposition testimony as support for its argument that the surveys are still reliable even though the respondents almost certainly applied different meanings to the term "small but significant." Opp. at 15 (citing Mathiowetz Tr. 70:10-18; 127:5-128:5). But Prof. Mathiowetz was testifying about her use (in other surveys) of the words "otherwise healthy person" and "chronic conditions," which truly are "plain language words," unlike the antitrust term of art Dr. Simonson used. Opp., Ex. 5 (Mathiowetz Tr.) at 70:10-18; 127:5-128:5.

## CONCLUSION

The Court should exclude Dr. Simonson's opinions.

[1] Notably, in *Firebirds,* the defendants—who contended that the question phrasing rendered the plaintiffs' expert surveys unreliable—relied on a rebuttal report from **Dr. Simonson**. *Id.* at *2.

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**CERTIFICATE OF SERVICE**

I certify that on December 23, 2024, this document was filed electronically in compliance with Local Rule CV-5(a) and served on all counsel who have consented to electronic service, per Local Rule CV-5(a)(3)(A).

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